81-1780

Supreme Court, U.S.
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NO.

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1981

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UNITED STATES OF AMERICA,
Respondent,

v.

JOHN BAGNARIOL,
Petitioner.

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTION PRESENTED FOR REVIEW

May petitioner's conviction under 18 U.S.C. 1962(d) and 1962(c) be upheld when the sole proof of the existence of the element of an "enterprise" consisted of proof of the "pattern or racketeering activity" involved?

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## PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that a writ of certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit, filed on December 21, 1981.

## OPINION BELOW

The opinion of the Court of Appeals is reported at 665 F.2d 877 (1981), and is reproduced in Appendix A. The Judgment and Commitment of the District Court was filed on November 24, 1980, and is reproduced in Appendix D. (The Appendices are submitted separately in conjunction with the petitions of the two co-defendants.)

## JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed and entered on December 21, 1981. Petitioner filed a timely motion

for rehearing which was denied on February 2, 1982. The order denying the petition for rehearing is reproduced in Appendix G.

The jurisdiction of the Court is invoked under Title 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The question presented involves interpretation of 18 U.S.C. §§ 1961(5) and 18 U.S.C. 1962. The texts of these statutes is reproduced in Appendix H.

## STATEMENT OF THE CASE

A. Procedural Background.

Petitioner John Bagnariol was convicted of violations of 18 U.S.C. § 1962(d) (Conspiracy to violate the RICO statute), 18 U.S.C. §§ 1962(c) and 2 (RICO), 18 U.S.C. §§ 1951 and 2 (Extortionate interference with interstate commerce), 18 U.S.C. § 1952(a)(3) (Interstate travel to promote bribery),

18 U.S.C. § 1952(a)(3) (Interstate use of telephone to promote bribery) and 18 U.S.C. §§ 1341 and 2 (Mail fraud). Only the convictions of 18 U.S.C. §§ 1962(d) and 1962(c) are relevant to this petition.

Petitioner was sentenced to five years on each count, said sentence to run concurrently.

B. Factual Background.

The evidence adduced at trial, taken most strongly from the government's point of view, was as follows:

Petitioner John Bagnariol, at times pertinent to the issues herein, was a duly elected Representative to the Washington State Legislature and either the Speaker or Co-Speaker of the House of Representatives.

Co-defendant Gordon L. Walgren was a duly elected Senator in the Washington State Legislature and also

was the leader of the Democratic majority party in the Senate.

Co-defendant Patrick Gallagher was, among other things, a lobbyist hired by private interests to represent them before the Legislature.

Beginning in the summer and fall of 1978, undercover FBI agents, pretending to be businessmen from California interested in going into the gambling business in the State of Washington, met Bagnariol and Walgren through their association with Gallagher.

Over a period of approximately twenty months these agents met and engaged in telephone conversations with the defendants. Most of these conversations were surreptitiously recorded.

The purport of the association

between the agents and the defendants was to effect a scheme whereby the defendants would use their influence to see that bills favoring expanded gambling in Washington were passed by the legislature. The passage of such legislation would benefit the interests of the businessmen from California.

In return for their efforts each of the defendants was to receive 6% of the gross profits of the Washington gambling enterprise. The reception of these monies by the defendants was to be hidden through the operation of an off-shore corporation to be formed in the Cayman Islands.

Interstate trips and interstate phone calls occurred during this relationship.

Some monies and benefits were bestowed on the defendants by the agents. These

monies were not reported on the defendant's Public Disclosure Forms, required of lobbyists and legislators under Washington law, which were mailed by the defendants to the appropriate office in the State capital in Olympia, Washington. This, as indicted, constituted mail fraud.

## REASONS FOR ALLOWING THE WRIT

### THE COURT SHOULD GRANT THE WRIT TO CLEARLY DEFINE WHETHER AN ASSOCIATION OF INDIVIDUALS WHICH IS NOT SEPARATE AND APART FROM THE ACTS WHICH FORM A PATTERN OF RACKETEERING ACTIVITY CONSTITUTES AN "ENTERPRISE" WITHIN THE MEANING OF 18 U.S.C. §1961(4)

In United States v. Turkette, ____ U.S. ____, 69 L.Ed.2d 246, 101 S.Ct. 2524 (1981) it was stated,

> "That a wholly criminal enterprise comes within the ambit of the statute does not mean that a 'pattern of racketeering activity' is an 'enterprise.' In order to secure a conviction under RICO, the Government must prove both the existence of an 'enterprise' and the connected

> 'pattern or racketeering activity.' The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by statute. 18 U.S.C. § 1961(1) [18 U.S.C.S. § 1961(1)]. The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government." ____ U.S. ____, 69 L.Ed.2d 246 at 254-255, 101 S.Ct. 2524 at 2528-2529.

Petitioner argued before the trial and appellate court that there was no proof of a separate entity of Bagnariol-Walgren-Gallagher apart from the proof of

the pattern of racketeering activity in which it was engaged. The Ninth Circuit stated,

> "Even if that were the case, the Supreme Court in Turkette recognized that 'the proof used to establish these separate elements may in particular cases coalesce.' 101 S.Ct. at 2528.
>
> In any event, as we note above, the government presented ample evidence to show the existence of an ongoing organization functioning as a continuing unit. See id. That the evidence sometimes consisted of conduct constituting the pattern of racketeering activity is irrelevant.[8/]"
>
> Appendix A, pages 51-52.

It is submitted that the proof at trial, as shown by the record, consisted solely of evidence relating to the racketeering activities of the petitioner and his co-defendants.

Prior to the FBI investigation there was no such entity. The evidence of the association of the defendants was

shown to be solely related to the commission of the predicate crimes of which they were convicted. There was no evidence that their "enterprise" was in any way separate and apart from the pattern of racketeering activity.

Respectfully, the appellate court did not meet or discuss petitioner's contention in this regard.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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